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IN THE

Supreme Court of the United States

October Term, 1934

No. 625

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.

Petitioners

against

EUGENE F. O'CONNOR, JR., *et al.*

Respondents

REPLY BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION

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REPLY BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION

Respondent states (brief p. 1) that the record below presented for review the following question of law.

> "In a composition in bankruptcy where the liabilities total $13,008,038.30, and creditors are to be paid 100%, are the referee's commissions, as prescribed by § 40-a (11 USCA 68a) of the Bankruptcy Act, to be computed on the total claims $13,008,038.30 as 'the amount to be paid to the creditors', or on $4,812,974.17?"

It need hardly be pointed out that the question here presented is that set forth on page 3 of the petition for certiorari. That question is as follows:

> "Whether, in case of a composition under Section 12 of the Bankruptcy Act, the Bankruptcy Act requires that the compensation of a referee *must* be computed not only upon the amount of cash (in this case 15%) paid to creditors upon the confirmation of such composition, but also upon the face or nominal amount remaining due (85%) upon bonds which the creditors retain, rather than (if such bonds are to be considered at all) upon the proven, actual and real value of such bonds at the time of the confirmation of the composition."

Hence, the above quoted question stated by respondent wholly begs the issue, because in the District Court, in the Circuit Court of Appeals, and also in this Court, the issue is what is the "amount to be paid to creditors upon the confirmation of the composition."

This correction applies also to the statement on page 3 of respondent's brief which purports to answer the challenge contained in the petitioner's main brief (p. 9) to point out a definite authority for the statement that "creditors are to be paid 100%." Respondent refuses to meet that challenge and now shifts the statement to a so-called "100% settlement," whatever that may mean.*

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* The letter from the bankrupt's president (R. pp. 62-3) to its creditors, to which the referee refers on page 3 of his brief, does not justify the Referee's claim. So far from promising the creditors one hundred cents on the dollar upon the confirmation of the composition, it recognizes that their bonds are worth less than their face value, and states, "we believe the *value* of your bonds will be greatly improved by the early acceptance of this offer of composition." The value of the bonds, according to the Commercial and Financial Chronicle of February 23, 1934, the date of such letter, was 24 bid, 26 asked (R. p. 79). The price of 36½ bid, 37½ asked (R. p. 77) at the date of the hearing on the confirmation of the composition, March 23, 1934, represents an improvement in value of approximately $12 per $100 after the acceptance of the composition by the creditors.

It is to be noted also that respondent on page 3 refers the Court to the terms of the offer, but refrains from quoting the offer with respect to "the amount to be paid to creditors upon the confirmation of the composition."

I

(Replying to Point I of Respondent's Brief)

Respondent's counsel perhaps places much emphasis upon General Order XLVIII promulgated by this Court, dealing with referees' fees under Section 74 of the Bankruptcy Act, which applies to extensions for individual debtors. As already pointed out in our main brief (pp. 24-6), this Court made a special rule for referee's fees in extension proceedings pursuant to Section 74 because no such rule applied to bankruptcy compositions under the old Act.

We call attention to the following additional point in this connection.

Section 74 (m) provides that in extension proceedings "the title, powers, and duties of its officers and, *subject to the approval of the court,* their fees • • • shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered." The words "subject to the approval of the court" show that the court was empowered, in dealing with extension proceedings where no cash compositions were made, to provide a method of compensating referees. Hence, the adoption by this Court of General Order XLVIII cannot provide any basis for the argument that this Court thereby declared that in bankruptcy compositions under Section 12 the face amount of notes or securities to be received shall be the gauge of the fees to be paid.

The words "subject to the approval of the court" make it clear that the court has full discretion within the maximum permitted by General Order XLVIII to allow a lesser sum.*

Aside, however, from these questions of the construction of General Order XLVIII, we call attention again to the decision of this Court in *West* v. *Lee*, 174 U. S. 590-599, which shows that the power of this Court to enact rules of practice does not authorize additions to the substantive provisions of the Act. We are therefore faced squarely with the question, argued in our main brief, viz., whether Section 40 means that in this case the referee's compensation shall be computed on the face amount or on the market value of the extended bonds.**

II

(Replying to Point II of Respondent's Brief)

Respondent's argument here is largely to the effect that most referees are frequently underpaid. That issue is not before this Court, nor is it at all proved that referees are underpaid. See also Appendix

* Solicitor General Thacher had this provision in mind when he suggested the language of General Order XLVIII. See Memorandum to the Chief Justice and the Associate Justices, dated April 3, 1933, page 31, n. 50. The cases cited in the Solicitor General's memorandum, as set forth in our main brief (see also 44 Yale L. J. 164) by no means support the application to the present case of the provisions of the measure of face value.

** It is significant also that Section 74 and General Order XLVIII apply only to compositions or extension proposals of natural persons, whose composition notes are not traded in on the market like the securities of a corporation, and consequently do not raise the present problem of their valuation.

Section 72 of the Bankruptcy Act discloses the intention of Congress. It is there stated that neither the referee nor any other officer of the court shall "in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act." Section 72 thus fixes a maximum and does not purport to deprive the courts of discretion in fixing a reasonable standard of fees within that maximum. And we repeat, that the sole question here is what did Congress in fact intend the referee should receive in the type of situation which is here presented to this Court. We submit that if Congress intended that securities offered as a part of a composition should be included in the measure of compensation to a referee, then the value of such securities is the only test which is consonant with fairness and good sense.

III

(Replying to Point III of Respondent's Brief)

Respondent refers to other sections of the bankruptcy statute having no bearing upon the question now before the Court and not containing the word "upon," one of the significant terms of Section 40, with which we are here dealing.

The distinction between the words "moneys disbursed" and the "amount to be paid" furnishes no indication of the meaning of the word "amount." When the Act refers to sums distributed to creditors as dividends it is natural to speak of moneys disbursed. When, however, on the other hand it refers to a composition the natural approach is different. The question which is then determinative of the referee's compensation is the amount which the bank-

rupt's offer provides shall be paid upon the confirmation of the composition. It is therefore natural to speak of "the amount to be paid."

"Amount" may have a different meaning from "money," but its sense cannot be arrived at by treating a promise to pay as money.

Any possible distinction which may be spelled out between "moneys disbursed" and "amounts to be paid" is of little weight in the face of the plain meaning of Section 40, that the significant figure is the amount to be paid "*upon* the confirmation of the composition."

An analogy may also be drawn to those cases in which the "amount" * of a corporate officer's income paid partly in cash and partly in notes or bonds, has been determined for income tax purposes. Such notes or bonds have been held to be income only to the extent of their market value at the date of receipt. (Appeal of Walter T. Smith, 4 B. T. A. 397.)

Nor do the words "consideration to be paid," as used in Section 12 of the Bankruptcy Act, give any support to the Referee's claim on this appeal. The Referee contends that moneys which may be paid nine years after the confirmation of the composition are to be included in the computation of his fees as the "amount to be paid upon the confirmation of the composition." It is quite apparent, however, that moneys which may be paid nine years hence cannot possibly be deposited as part of the consideration which must, under Section 12, to which the referee resorts, be deposited.

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* Treasury Regulation 86, Art. 22 (a)—3, provides:

> "If services are paid for with something other than money the fair market value of the thing taken in payment is the amount to be included as income."

IV

(Replying to Point IV of Respondent's Brief)

That the composition "contemplates an ultimate 100% payment to all creditors"* (which we confidently hope may be achieved) is beside the point. The referee can only be paid compensation on the amount to be paid "*upon the confirmation of the composition.*".

Judge HOUGH, in *In re Mirkus*, 289 Fed. 732, had under consideration the effect of Section 14c of the Bankruptcy Act (discharge as a result of composition) and not Section 40. The word "upon" is not used in Section 14c, and no reference to that word or to Section 40 appears in Judge HOUGH's opinion.

The issue of the surviving validity of the guarantee of New York Investors, Inc., is not before the Court on this appeal.** Aside from the decision of this Court in *Myers v. International Trust Co.*, 273 U. S. 380, it is not open to the referee to argue that the guaranties of New York Investors, Inc., "were not worth the paper upon which they were written," on the ground that the guarantor was in equity receivership at the time of the composition. New York Investors, Inc., is now in reorganization under Section 77B of the Act, and the claim of Manufacturers Trust Company (referred to at page 39 of respondent's brief)

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* The quotation is from respondent's brief, page 32.

** It is an amazing spectacle to find the referee, at page 12 of his brief, questioning a composition upon which he has previously given a favorable report, and suggesting that one of its terms can bring only disillusionment.

upon the guaranty of New York Investors, Inc., filed during the equity receivership, must ultimately be determined in that proceeding.

V

(Replying to Point V of Respondent's Brief)

If we understand the burden of this point, it is that the respondent, as referee, should have himself made the finding of fact upon which his own fees are to be determined. Aside from the fact that the referee did not in this case certify his fees (see R. p. 65), the impropriety of any such procedure is sufficient to refute any argument that the affidavits with reference to the value of the outstanding bonds of the bankrupt should have been submitted to the referee and not to the court.

The suggestion on page 43 of respondent's brief, that he was present in court upon the hearing upon the confirmation of the composition "solely as a witness called to testify on creditors' specifications of objections," is neither supported by the record nor is it the fact. The referee not only had notice of the objections made by the bankrupt (R. p. 57) to the basis of compensation claimed by the referee, but he was in court because he was interested in the amount of his fees, and the District Judge expressly offered him opportunity to answer the proof and file a memorandum* in support of his own position" (R. p. 68).

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* The Referee in fact submitted to Judge GALSTON a memorandum of 23 typewritten pages, and a reply memorandum of 8 pages, in support of his claim to fees.

VI

There was no reason for summons and severance in this case.

(Replying to Point VI of Respondent's Brief)

The case arises on the bankrupt's application for confirmation of the composition (R. p. 50). The bankrupt's objection to the referee's claim as to the amount of his commissions was set forth therein (R. p. 56).

The referee, disappointed with the District Court's ruling as to the amount of his fees, appealed to the Circuit Court of Appeals, and cited as appellees on that appeal not only the bankrupt, but most of those who appeared at the composition hearing. The appellees include: the receiver, who admittedly "has no interest in the outcome of the appeal" (R. p. 5), the Collector of Internal Revenue, Almon G. Rasquin, who was not even represented at the composition hearing (R. p. 66), and numerous others whose interest in this appeal is almost equally obscure.

Only two of these many appellees appeared and opposed in the Circuit Court of Appeals, namely, Realty Associates Securities Corporation and Realty Associates, Inc. (R. p. 152).

These appellees, Realty Associates Securities Corporation and Realty Associates, Inc., after the Circuit Court of Appeals' decision, joined in a petition for certiorari. The referee made no objection at that time, when any defect might still have been remedied, to account for the failure of the other miscellaneous appellees chosen by him, to join in that petition.

The bankrupt, Realty Associates Securities Corporation, is clearly the only party directly affected by the order appealed from, for the referee's fees must be paid out of a fund deposited by and returnable to it; and the composition expenses cannot be deducted in determining the earnings payable to the creditors (Indenture, pp. 25-26). Realty Associates, Inc., the largest creditor (R. p. 22), and the only creditor which took part in the proceedings before the Circuit Court of Appeals, joined in the petition; but the bankrupt, for the purposes of this appeal, certainly represents all the creditors (Cf. *Fleischmann* v. *Wolfsohn Drygoods Co.*, 299 Fed. 15 (C. C. A. 5).

Summons and severance has never been required in a case analogous to this one. In fact, the cases from this Court cited by the referee, all had to do with money judgments entered jointly against more than one defendant.

The mere fact that parties' names appear in the caption of a cause does not indicate that the decree is joint, and that all must appeal. Even the surety in a libel in admiralty is not a necessary party to an appeal by the claimant from a judgment awarding execution against both the claimant and the surety. *Elliott* v. *Lombard*, 239 U. S. 139.

Parties who have defaulted, as did all the other appellees before the Circuit Court of Appeals, need not join in an appeal. *Winters* v. *United States*, 207 U. S. 564, 575.

Moreover, even if this were a proper case for summons and severance, there has been full compliance with that requirement, because all the other appellees before the Circuit Court of Appeals were served with copies of the petition for certiorari herein. This constituted sufficient notice of the appeal within the rules of summons and severance.

This Court stated, in *Masterson* v. *Herndon,* 10 Wall. 416, 418:

> "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal."

See also:

O'Dowd v. *Russell,* 14 Wall. 402;
Hardee v. *Wilson,* 146 U. S. 179, 182;
6 Cyc. of Federal Procedure, § 2731
Robertson, Appellate Practice and Procedure in the Supreme Court, 94.

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed and the order of the District Judge affirmed.

Dated April 4, 1935.

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ORRIN G. JUDD,
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Of Counsel.

APPENDIX

Senate Document No. 65, to which reference is made in the text and footnote of the brief of the Referee, at page 23, also contains other pertinent material.

That document, at page 125, recommends that:

> "Referees shall receive as full compensation for their services salaries to be fixed by the Attorney General for the terms for which they are appointed, at reasonable rates not more than $10,000 per annum, to be determined in each instance with relation to the volume of business likely to be transacted in the district."

The report also contains the following material with regard to the amount of time spent by referees in performance of their duties under the present system (p. 171):

> "It is apparent then, that about one-fifth of the referees are on a full-time basis; that about one-fourth devote a majority of their time to bankruptcy; that over half devote less than a majority of their time to bankruptcy; and that at least one-third spend one day or less per week on bankruptcy."

These facts are significant with regard to the figures set forth in the brief of the Referee, at page 24, showing that under the present system of fees, most Referees earn less than ten thousand dollars a year.